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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Bell Atlantic Telephone Companies) CC Docket No. 98-168
Tariff FCC No. 1)
Transmittal No. 1076)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REBUTTAL

Introduction and Summary

In its Direct Case, Bell Atlantic¹ showed that its InfospeedSM Digital Subscriber Line ("DSL") service is an interstate/interexchange service, because it is primarily used for Internet access. As a result, DSL is properly filed with the Commission. Moreover, because access to the Internet is interstate and interexchange, any service which is used to access the Internet is not subject to the reciprocal compensation provisions of the 1996 Act, 47 U.S.C. § 251(b)(5).

Most of the commenters here merely repeat arguments they made on the direct cases of other companies that filed federal tariffs for similar DSL services – either by attaching their earlier filings or repeating the arguments verbatim. Bell Atlantic already addressed most of those issues in its Direct Case. For example, with respect to the jurisdictional nature of the traffic at issue here:

¹ The Bell Atlantic telephone companies participating in this filing ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

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- The Commission and the courts, including the Supreme Court, have already held that Internet traffic is overwhelmingly interstate and interexchange in nature. And to the extent some Internet calls or portions of calls may go to a database in the same state, the courts have found that any intrastate elements of Internet access cannot be separated from the predominantly interstate portions. *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998). Under those circumstances, the entire service is jurisdictionally interstate. *See* Direct Case at 3-4, 5-7.
- The nature of the end-to-end communication determines whether a telecommunications (or information) service is interstate or intrastate, regardless of whether a portion of the service is provided by an ISP, by CPE, or through a private system. This principle has been confirmed in a long, unbroken line of Commission and judicial precedents, all of which have rejected the “two-call” claims that some of the parties persist in advocating. Contrary to their unsubstantiated allegations, nothing in any of those precedents changes the jurisdiction over a service based upon which portion of the end-to-end service is telecommunications and which portion an information service.² *See* Direct Case at 4, 7-8.
- The “enhanced service provider exemption” does not make Internet Service Providers (“ISPs”) end users. The exemption merely allows them to subscribe to existing local business lines instead of interstate access services. Acknowledging that ISPs are not considered end users for any other purpose would not subject ISPs to switched access charges, because they may still use local business lines, and it would certainly not increase the price of Internet service to the public, as some of the competitors erroneously claim. *See* Direct Case at 9-10.
- A contrary conclusion would subject Internet traffic to the payment of reciprocal compensation, and by doing so would deter competition and deter development of the very advanced services that the Commission

² One party mischaracterizes a key precedent, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619 (1992). Focal at 4. Focal claims that the Commission never decided whether the enhanced service extended the jurisdictional reach of the telecommunications service. However, that is precisely the import of this decision – the jurisdiction over the entire service, both the telecommunications and enhanced service portion, is determined by the nature of the end-to-end communication flowing over that service, just as it is here. And the decision did not turn on which part of the service is telecommunications and which part enhanced, as Focal seems to claim.

is under a statutory direction to promote. *See* section 706(a). As the Chairman of COVAD has explained, subjecting services used for Internet access to reciprocal compensation creates a "boondoggle" that will "slow down the deployment of a high-speed packet-based network." What's more, nearly all of the states that have decided the issue have stated or implied that their decisions are subject to further review once this Commission addresses this issue. It would simply exacerbate the problem if more and more states were forced to interpret reciprocal compensation provisions of interconnection agreements without obtaining guidance from this Commission on the nature of Internet traffic. *See* Direct Case at 10-12.

Likewise, with respect to allegations that the price of Bell Atlantic's DSL service may effect a "price squeeze":

- Loop costs are not properly part of the incremental costs of providing DSL and should not be imputed to DSL. No party has attempted to refute Bell Atlantic's showing that competitors are able to recover the costs of unbundled loops in their charges for all the various services they provide using those loops, to the same extent as Bell Atlantic. Therefore, there is no "price squeeze" in the rate Bell Atlantic charges for DSL.³ *See* Direct Case at 12-14.

In the remainder of this filing, Bell Atlantic will address those issues it did not discuss in the direct case and the few new arguments the parties raised in their comments.⁴ One party, for example, claims that states have jurisdiction over DSL, because section 706 of the 1996 Act gives authority to promote advanced services to both the Commission and the states, RCN at 2. That section, however, provides that "[t]he

³ One party claims that Bell Atlantic "admits that the DSL price does not cover the cost of the loop that it charges to its competitors." NorthPoint at 5. NorthPoint does not reference where it alleges Bell Atlantic made such an admission, because it has not.

⁴ Some arguments, such as the claim that advanced services should be offered through a separate affiliate and the characteristics of any such affiliate, are under consideration in CC Docket No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, and should not properly be dealt with here. *See, e.g.*, ACI at 14, NorthPoint at 5, Internet Service Providers' Consortium at 9-13. Bell Atlantic has fully briefed those issues in that proceeding.

Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment ... of advanced telecommunications capability.” Section 706(a) (emphasis added). On its face, this language does not give either this Commission or the states any new jurisdiction but provides a policy direction for their exercise of their existing jurisdiction. Because DSL is used for Internet access, the FCC already has jurisdiction. This section requires that it exercise that jurisdiction in a manner that promotes advanced service development, and subjecting such services to reciprocal compensation will discourage such development.

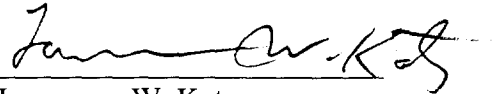
Another party asserts that DSL should be tariffed at the states, because the local loop over which the service rides is under state jurisdiction. Therefore, the argument goes, federal authority would cause a “mix and match” problem. Hyperion at 6. Hyperion is wrong. DSL carries interstate and interexchange traffic and is therefore properly tariffed at the federal level. The particular facilities that carry the service do not dictate jurisdiction, only the interstate or intrastate nature of the communication. *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (“Every court that has considered the matter has emphasized that the nature of the communications is determinative [of jurisdiction] rather than the physical location of the facilities used.”). *See also, CompTel v. FCC*, 117 F.3d 1068, 1072, 1075 n.5 (“*CompTel*”) (Confirming that, under the 1996 Act, the Commission retains jurisdiction over interstate/interexchange traffic, while the states retain their jurisdiction over intrastate services). And the Commission’s entire access scheme is predicated on the fact that the local loop is used both for local calls and for interstate access. Under Hyperion’s argument, interstate access for long distance

telephone service would need to be tariffed at the state level and the Commission would be deprived of jurisdiction over such services.

Another erroneous claim is that Bell Atlantic is arguing inconsistently for federal authority over reciprocal compensation here and state authority at the Supreme Court. Focal at 6, n.14. Focal is wrong, Bell Atlantic specifically supported the Commission's continued authority over interstate, interexchange traffic, and that authority was sustained in *CompTel*. The issue before the Supreme Court in *Iowa Utilities* is the Commission's jurisdiction over rates, terms and conditions for local unbundled network elements, jurisdiction which Congress specifically gave to the states. Bell Atlantic has always supported, and the courts have confirmed, that this Commission has the authority to determine whether a service is jurisdictionally interstate or intrastate. That authority existed before enactment of 1996 Act, and nothing in that Act or the *Iowa Utilities* decision changed it. Therefore, the Commission has jurisdiction, and should promptly decide, the threshold question of whether Internet access is subject to section 251.

Bell Atlantic has shown that DSL is properly tarified at the federal level, because it is primarily used for Internet access. Internet access consists of end-to-end jurisdictionally interstate and interexchange communications between the end user and the distant Internet sites. None of the parties has provided a valid reason for the Commission to find otherwise.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Lawrence W. Katz", written over a horizontal line.

Lawrence W. Katz
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-4862

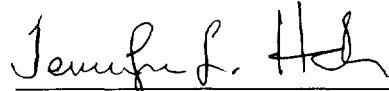
Edward D. Young, III
Michael E. Glover
Of Counsel

Attorney for the Bell Atlantic
telephone companies

October 22, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 1998, a copy of the foregoing
“Rebuttal” was sent by first class mail, postage prepaid, to the parties on the attached list.



Jennifer L. Hoh

* Via hand delivery.

Competitive Pricing Division*
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554
(2 copies)

ITS*
1919 M Street, NW
Washington, DC 20554

Kathryn C. Brown*
Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

James D. Schlichting*
Chief, Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, DC 20554

Judith A. Nitsche*
Tariff and Price Analysis Branch of the
Competitive Pricing Division
Federal Communications Commission
Room 514
1919 M Street, N.W.
Washington, DC 20554

Eugene Gold*
David Hunt*
Tamara Preiss*
Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, DC 20554